



STATE OF WASHINGTON
PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director

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MINUTES

September 27, 2004

A special meeting of the Public Employment Relations Commission was held at 10:00 a.m. in the Public Employment Relations Commission Conference Room, 9757 Juanita Drive NE, Suite 201, Kirkland, Washington. Those present and participating were:

Marilyn Glenn Sayan, Chairperson
Joseph W. Duffy, Commissioner
Pamela G. Bradburn, Commissioner
Marvin L. Schurke, Executive Director
Majel C. Boudia, Confidential Secretary
Dario de la Rosa, Assistant to the Commission
Mark S. Downing, Compliance Officer
Kenneth J. Latsch, Operations Manager

Also present and participating:

Greg Devereux, Washington Federation of State Employees
Carolyn Klinglesmith, Washington Federation of State Employees
Gladys Burbank, Washington Federation of State Employees
Merrilee Miron, American Federation of Teachers/Washington
Nancy Kennedy, American Federation of Teachers/Washington
Michael Reitz, Evergreen Freedom Foundation
Jami Lund, Evergreen Freedom Foundation
Susan Jankowski, K-12 Teacher

MINUTES OF PREVIOUS MEETING

The minutes of the meeting held on July 13, 2004, were approved as submitted at this meeting. The Commission also approved an amendment to the minutes of the meeting held on May 11, 2004, to correct mischaracterization of a court docket item.

REPORT OF THE EXECUTIVE DIRECTOR

1. Mr. Schurke reported that case intake for August was light, with 70 cases filed. The current Fiscal Year average is 68



cases per month, which is down 25 percent from the previous Fiscal Year.

2. There were 90 cases closed during the month of August. The current fiscal year average is 101 cases closed per month, which is up from the previous Fiscal Year.
3. There were 509 pending cases at the end of August. That is better than at any time during the previous Fiscal Year.
4. Unfair Labor Practice Manager Mark S. Downing has caught up on preliminary rulings, which are required by the Administrative Procedure Act within 30 days after a case is filed. A large number of cases are being processed at the hearing level.
5. Mr. Schurke noted that he continues to monitor the "Red List" (cases ready for decision more than 90 days), and the "Yellow List" (cases ready for decision for 45 - 89 days). These lists are in favorable condition.
6. Mr. Schurke read two messages received by Sally Carpenter from representatives of the Eastmont School District, thanking her for her assistance in mediation with the Eastmont Education Association. Mr. Schurke reported that the schools/teachers mediation season was very quiet, with no talk of potential work stoppages except at the Eastmont School District. Two other cases were filed after school started.
7. Mr. Schurke reported that an election is set for the faculty bargaining unit at Eastern Washington University, with ballots to go out in October for a tally in November. This is the second bargaining unit to be organized under the new FCBA.
8. Mr. Schurke reported that state employee bargaining is coming to conclusion, with bilateral settlements reached at all seven of the General Government main tables plus the two community college coalition tables. David Gedrose mediated a settlement between SEIU Local 925 and the University of Washington. Vincent Helm is mediating today in negotiations between SEIU District 1199NW and the University of Washington. Mr. Schurke asked Greg Devereux for confirmation about the status of state government negotiations, and Mr. Devereux replied that he agreed with the assessment given by Mr. Schurke.

ACTION ON PETITION FOR RULE-MAKING

Mr. Schurke briefed the Commission. Several individuals filed rule-making petitions about two years ago, asking for rules requiring notice of employee rights under the federal constitution. The Commission declined to adopt the rule proposed at that time, because a decision of the Supreme Court of the State of Washington

had said the Commission has no authority to enforce the federal rights. Several petitions filed by individuals this year were initially understood to be closely-related to the action two years ago, because they sought voting rights for individuals who had asserted their federal rights, and the letters sent to those people were described at the Commission's August meeting. After the August meeting, one individual responded with a different argument and the Evergreen Freedom Foundation (EFF) filed a similar rule-making petition. The proposed rules now before the Commission would allow all non-members to vote on union elections or motions affecting their wages, hours or working conditions (which are understood to include bargaining proposals and contract ratifications). The petitions were thus placed on the agenda for this meeting. The Administrative Procedure Act (APA) allows individuals to request an agency to initiate rule-making. The Commission must consider the request, and either initiate rule-making or decline to do so. Law Clerk Dario de la Rosa added there is a right of appeal to the Governor if an agency denies a rule-making request.

Michael Reitz and Jami Lund were present representing the Evergreen Freedom Foundation (EFF).

Mr. Reitz stated that the petition covers rights of the agency fee payers (teachers and public employees) who have been denied the right of voting on contracts. He stated that the proposed change to the rule would operate if unions allow employee votes, because employees who have been excluded from voting would be allowed to participate on matters that affect their workplace. He stated that voting on contract ratification is not directed at running union business. He noted that all bargaining unit members were allowed to vote on ratification of the contracts negotiated under the PSRA.

Mr. Lund cited Chapter 41.56 RCW and other similar statutes under which all bargaining unit employees are equally represented, and he urged the proposed rule would be an appropriate change which could be made at the administrative level. He sought to distinguish the Supreme Court decision that had been cited (Local 2916 v. PERC) as dealing with the unfair labor practice arena, and stated that the EFF is not alleging an unfair labor practice, so the Supreme Court case is not on point. He stated that agency fee payers are bargaining unit members who are opting out for their own reasons, and that these employees feel they are being discriminated against. He described the proposed rule as narrowly tailored, to only allow agency fee payers equal rights in issues that affect them, and only when union security is in effect.

Greg Devereux of the Washington Federation of State Employees stated that this seemed to be a solution in search of a problem. He noted that all of the EFF examples are teachers, and that the ratification process for state employees has not concluded, so that it would be ridiculous to put a new rule in place for state

employees. Mr. Devereux also stated that he had received a "spam" e-mail message that hurts the EFF's credibility.

Gladys Burbank of the Washington Federation of State Employees stated that she failed to see how the proposed rule change would create uniformity. She noted that federal laws dictate how unions conduct business, that the duty of fair representation has been dictated by the courts, and that unions are mindful of those court decisions. She stated that employees are paying for representation, but are also receiving representation. She urged it would be inappropriate for the Commission to dictate how ratification votes should occur, and that the new state contracts provide for agency fee payers to be able to vote on the contract. She recommended that the agency decline to take action, and let the decision be internal or for the courts to decide.

Mr. Lund responded that non-members were not allowed to vote on ratification of Washington Public Employees Association contracts in the state arena. He reiterated that all bargaining unit members should be allowed to vote. Responding to a question from Commissioner Duffy, Mr. Lund stated that state law obligates unions with a duty of fair representation for the entire bargaining unit.

Nancy Kennedy of the American Federation of Teachers/Washington stated that much is left to local control, and that a rule change is not necessary. She noted that joining a union is a matter of choice, and that agency fee payers do not necessarily pay 100% of dues paid by members, so that agency fee payers are paying only for representation. If they want all the benefits, they should pay the full union fee.

Eric Nordlof of Public School Employees of Washington (PSE) filed a written memorandum opposing the proposed rule change and also addressed the Commission. He urged that the Commission does not have authority to make the proposed rule change. He explained that PSE is a non-profit organization where an employee must be a member to be a shareholder under other state law, and he does not see how it would be legally permissible for non-members to participate in internal union business.

Susan Jankowski introduced herself as a teacher and spoke in support of the proposed rule. She stated that she should be able to vote as an agency fee payer. She asked the Commission to focus on what has happened, and that the EFF has been talking about what has happened. Responding to a question from Commissioner Bradburn, Ms. Jankowski asserted she should have the right to vote on many of the issues affecting her job and community, but doesn't want to vote on all union business.

Mr. Lund concluded the arguments by comparing the EFF proposal to the Commission's authority over certification and decertification

of exclusive bargaining representatives. He stated that the EFF proposal is no different.

After a short break, Chairperson Sayan asked the Commission members for their comments.

Commissioner Duffy noted that this type of situation does not happen everyday. He said the options appeared to be: (1) Voting for the petition, (2) voting against the petition, or (3) studying the request further. He suggested the Commission should vote.

Commissioner Bradburn inquired about the provisions of the APA at RCW 34.05.330, and about what could happen under each of the three avenues. Law Clerk Dario de la Rosa explained that any petitioner could file an appeal with the Governor if the Commission denies the petition.

Commissioner Duffy moved to deny the petition, and Commissioner Bradburn seconded the motion. Discussion followed in which Mr. Duffy stated that legal research indicates neither the National Labor Relations Board nor other state labor relations agencies have gone down the road proposed by these petitions. He noted that the Commission often looks at what other organizations/agencies have done. Ms. Bradburn concurred, stating first that the Commission only has the authority given to it by the Legislature (as in *Local 2916 IAFF v. PERC*, 126 Wn.2d 375 (1995)), and that the agency cannot expand its jurisdiction by implication. She continued that the Commission is not granted authority over how unions run their affairs, which is what the proposed rule would do. Commissioner Bradburn next stated that the concerns raised by these petitions are addressed by the courts, especially federal courts, where this agency does not have authority to act. As a third point, Commissioner Bradburn noted that certain rights are granted by unions to members, and that the Commission does not have authority to modify those rights. Chairperson Sayan stated that this agency has no authority over internal union affairs. A vote was taken and the motion to deny the petition was passed unanimously.

The Executive Director announced that the APA requires written notice to parties filing petitions before the agency. He suggested that a formal decision be drafted and reviewed by the Commission before it is issued. The Commission members concurred.

COURT DOCKET

There were no new filings to add to the court docket, and no news from the courts to report.

COMMISSION DOCKET

The Washington Federation of State Employees had filed a request for reconsideration on four cases that had been dismissed by the Commission: *State - Corrections*, Case 18660-C-04-1201, *State - DSHS*, Case 18661-C-04-1204, *State - CTED*, Case 18664-C-04-1205, and *State - CTED*, Case 18665-C-04-1206. Mr. Devereux reviewed the history of those cases and asserted that the union understood from discussions with the Commission staff that it only had to file petitions under WAC 391-35-026 by June 30, 2004, and that the processing of cases did not need to be completed by that date. He stated that he and other union officials were surprised when the four petitions filed on June 30, 2004, were dismissed, and he asked the Commission to accept the cases under the rule permitting waiver of procedural defects.

Mr. Schurke stated that he wrote the rule in question and always understood it to require that the processing of cases be completed before new statutory provisions went into effect on July 1, 2004. He noted that the union could file representation petitions for the four units. He also noted that four other petitions filed on June 30 (concerning the bargaining rights of part-time employees in the higher education employees) were being processed as routine "change of circumstances" cases under WAC 391-35-020, based on a rule change adopted by the Washington Personnel Resources Board.

Responding to an inquiry from Commissioner Bradburn about what specifically has been lost by not processing these cases, Ms. Burbank stated that resources had been expended on work which would have to be redone. Carolyn Klinglesmith added that employees cannot participate in collective bargaining until this issue is resolved. Ms. Burbank added that filing for elections in smaller units and then filing to merge them into the larger units would be much slower. Ms. Klinglesmith stated that the union had told the employees they would be under the old-system contracts.

A discussion was had on the issues that could arise, and on whether the employees could be added to the old-system contracts. Chairperson Sayan suggested that the dismissal orders issued by the Commission without notice to any of the parties could be vacated, and that the parties could then frame issues or stipulate on the cases when they are processed. The other Commission members concurred with that suggestion. Mr. Devereux stated that the union would withdraw its motion for reconsideration if the Commission would vacate the previous order(s), and Chairperson Sayan accepted that verbal withdrawal as sufficient.

The Commission docket was reviewed in detail, and the status of each case was discussed.

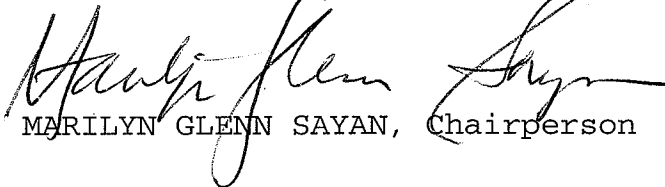
OTHER BUSINESS

A staff Formatting Task Force consisting of David Gedrose, Starr Knutson, Dianne Ramerman, Dario de la Rosa, Walter Stuteville and Executive Director Schurke presented their recommendations for a change of decision writing format and recommendation style changes, together with a sample decision. In particular, an issue-by-issue approach would be implemented using the issue-rule-analysis-conclusion (IRAC) method currently being taught in law schools. The Commission members made comments, and then unanimously approved the recommended changes.

ADJOURNMENT

There being nothing further to come before the Commission, the meeting was then adjourned.

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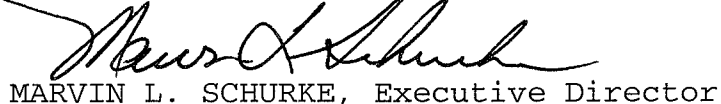
MARILYN GLENN SAYAN, Chairperson

JOSEPH W. DUFFY, Commissioner



PAMELA G. BRADBURN, Commissioner

ATTEST:



MARVIN L. SCHURKE, Executive Director